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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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No. 1788

CAREY TRANSPORTATION, INC.,

Petitioner,

against

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This brief is submitted by respondent Triborough Bridge and Tunnel Authority ("Authority") in opposition to the petition of Carey Transportation, Inc. ("Carey") for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York rendered on January 15, 1976 and entered on March 16, 1976 in the Office of the Clerk of New York County.

Statement of the Case

The petitioner's Statement of the Case, in discussing the decision of the Court of Appeals, omitted pointing out that the majority also found that the Authority did not violate any principles of classification.

Reasons for Denying the Writ

In its effort to persuade that this case involves the "special and important reasons" which Rule 19 of the Supreme Court Rules makes the touchstone for determining whether certiorari is to be granted, petitioner attacks one part of the decision of the New York State Court of Appeals' decision, but ignores the balance. Singled out as the target is that part of the opinion which offers "the proposition that the Authority when acting in its toll-fixing capacity is to act much like an entrepreneur might, letting economic forces and the maximizing of profit be at least in part its guide." (Petitioner's Appendix, p. A9) But the court below did not base its decision solely on that proposition. Rather, it put that proposition aside and tested the Authority's toll rates by general principles of classification. Its conclusion was that "Assuming that somehow the Authority's power to set and collect rates must be exercised on some uniform basis within classes of users of its facilities, the Authority has not violated any principles of classification." (Petitioner's Appendix, p. A9) That conclusion was reached by the court below after analyzing the distinguishing features of the two classes of buses involved and noting that the City of New York also distinguishes between the two classes when charging franchise fees for the use of its streets. (Petitioner's Appendix, pp. A9-10)

This is not surprising, for the court posited, as the issue before it

> "* * * whether the Authority in the operation of its facilities may fix tolls and charges which in its judgment will best serve its economic goals and public policy goals, including economic differentiation among its charges so long as there is not involved any of the invidious discriminations condemned by statute or Constitution, or some utterly arbitrary discrimination not related to economic considerations or some accepted public goal." (Petitioner's Appendix, p. A4)

Elsewhere, the court noted that the Authority's discretion to fix tolls is limited in that it cannot practice "invidious illicit discriminations" and its "differentials are not utterly arbitrary and unsupported by economic or public policy goals, as it reasonably conceives them." (Petitioner's Appendix, p. A9

That petitioner perceives the true basis of the court's decision appears on pages 8-9 of its petition where the majority opinion is described as attributing to the Authority the status of a tax collector. That passing reference and the suggestion of distinctions between taxes and tolls does injustice to an important part of the decision in which the court observes that even if the toll rate classification must be tested by principles applicable to taxation, it proves valid. (Petitioner's Appendix, p. A7) That part of the court's decision which discusses what petitioner labels the "entrepreneurial standard," then, is superfluous since the toll rate classification was found valid even when measured against the more rigorous standards applied to tax classification.

Since the decision of the court below can be sustained completely on its finding that the toll rates applied did not violate principles of classification, it is not necessary for the United States Supreme Court to take up the ques-

tion of whether toll agencies are subject to entrepreneurial standards which may be different from those applicable to state agencies.

"Special and important reasons" is illustrated in Rule 19 as "where a state court has decide a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." The phrase has been held to "imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1955).

Tested by that clarification, the decision below that a certain bus toll rate did not violate principles of classification cannot be said to present special and important reasons for review by the United States Supreme Court.

Nor is the decision below likely to have the national impact which petitioner foresees. (Petition, p. 8) The case itself primarily involves the use by petitioner's two-axlye buses of only one of the Authority's facilities. (Petition, p. 3, footnote) A recent inquiry addressed to the International Bridge, Tunnel and Turnpike Association, representing some 61 toll agencies in this country operating 157 facilities, disclosed that none of its members other than the Authority classified franchise buses for toll rate purposes according to the special/general distinction employed by the Authority.

Furthermore, the New York State Court of Appeals decided that the Authority's toll rate classification was consistent with applicable principles only after making a number of findings of fact which, if not conclusive as to the United States Supreme Court, are entitled to great

weight. The Court of Appeals found, for example, that the "special purpose" buses are not vehicles in mass transportation simply to move passengers between their homes and places of work, visiting or shopping; that the "general purpose" buses are forms of mass transportation from place to place in the course of daily life, usually regardless of the purpose of the passengers, and that the City of New York, in charging private bus lines franchise fees imposes different charges for the two classes. These findings of fact by the highest court of the State of New York are entitled to great respect although the United States Supreme Court is not, of course, precluded from making an independent inquiry. *Whitus* v. *Georgia,* 385 U.S. 45 (1966). Given the nature of the record and the character of these findings, however, it would seem unlikely that the United States Supreme Court would be inclined to substitute its judgment for that of the New York State Court of Appeals as to the nature of the services provided by the two kinds of bus operators.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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